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Supreme Court, U.S.
FILED
SEP 23 1996
CLERK

No. 96-292

In The

Supreme Court of the United States

October Term, 1995

MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, and H. DEAN SUMMERS,

Petitioners,

vs.

KRISTINE L. FANKELL,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Idaho

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI

or, in the Alternative,
MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, and H. DEAN SUMMERS,

Petitioners,

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS TO THE CLERK OF THE SUPREME COURT OF THE STATE OF IDAHO, FREDERICK C. LYON

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QUESTION PRESENTED FOR REVIEW

Where Idaho's neutral procedural rules provide that a party must obtain certification from the trial court prior to appealing an interlocutory decision, are Idaho state courts compelled to disregard the state rules and adopt federal appellate procedures by providing immediate appeals from a ruling denying state officials' claims of qualified immunity under 42 U.S.C. § 1983?

STATUTORY AND RULE PROVISIONS

42 U.S.C. § 1983 and Idaho Appellate Rule 11 are set out in Petitioner's Brief at 2, 3. Idaho Rule of Civil Procedure 54(b) is set out in Appendix A at 1a.

STATEMENT OF THE CASE

Factual and Procedural Background

Respondent Kristine Fankell brought claims, including under 42 U.S.C. § 1983, against state actor Petitioners for wrongful termination from state employment. Upon motion to dismiss, treated as a motion for summary judgment, the trial court denied the state actor's request for a qualified immunity defense, without comment. Appendix B at 3a. Petitioner's appeal was taken from the order entered denying the motion to the Idaho Supreme Court. See Petition at 6a, ¶ 2. The Clerk of the Idaho Supreme Court entered an order dismissing the appeal, Petition at 1a, and, later, another order denying a petition for rehearing on the appeal, Petition at 3a. Both orders note the trial court's order is not a final order under Idaho law.

REASONS FOR DENYING THE PETITION

1. No substantial federal question is presented here. The decision below rests on state procedural rules grounds that are not preempted by federal law.

The dismissal of Petitioners' appeal reflects Idaho civil and appellate procedures that provide that interlocutory decisions, here one denying a summary judgment motion, cannot be appealed unless a party first obtains a certification of finality from the trial court under Rule

54(b) of the Idaho Rules of Civil Procedure. Petitioners failed to obtain the certificate. Therefore, their appeal was properly dismissed under Idaho law: the trial court's decision was not a final order from which an appeal may be taken.

Section 1983 does not preempt such state procedural rules. The state's decision to apply its own rules, rather than the federal rule in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), does not impair any federal interests. The interests protected by *Mitchell's* holding, a defendant denied the qualified immunity defense may automatically appeal in the federal courts, are predominately *state* interests in state officers being able to avoid the burden of trial and discovery. This state interest is not a federal or an individual interest. Idaho, however, also has an interest in applying its own rules of civil and appellate procedure to cases brought in its courts. When a state decides that its interests in protecting state officers from the burden of discovery and trial are sufficiently protected by allowing appeals only after a certification of finality by the trial court, here to a specific issue which is subject to review (*Mitchell*) in accordance with local neutral rules (I.R.P.C. 54(b) and I.A.R. 11(a)), rather than automatic appeals, no substantial federal interest is implicated. Supreme Court review is inappropriate in the circumstances presented by this Petition.

Moreover, Petitioners' suggestion that Idaho procedures wholly foreclose any opportunity for appellate review is inaccurate. A direct, simple request to the trial court, citing the authority of law outlined in the Petitioner's request for rehearing before the Idaho Supreme Court, Petition at 8a, likely would have resulted in the issuance of the 54(b) certificate. The two orders of the

Clerk, and the pending Petition, would have been avoided for good reason: the denial of the defense is reviewable in accordance with neutral local rule.

2. The differences in state court procedures provide no basis justification for Supreme Court review.

The different state court rulings identified in the Petition, at 6-13, do not provide a justification for Supreme Court review. These rulings merely reflect the fact that different states have adopted different procedures for interlocutory appeals. Some states have found *Mitchell* persuasive and have adopted the federal procedure. Other states, like Idaho, have different procedures that do not permit automatic appeals. The Supreme Court does not have authority to resolve differences among state courts. Congress has not mandated that states apply uniform procedural rules to Section 1983 actions. The Supreme Court has recognized the differences are to be honored:

> 3. When a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, we must act with utmost caution before deciding that it is obligated to entertain the claim. [Citations omitted.] The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necesarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented. The general rule "bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." [Citations omitted.] *The States thus have great latitude to establish the structure and jurisdiction of their own*

courts. [Citations omitted.] In addition, States may apply their own neutral procedural rules to federal claims unless those rules are preempted by federal law.

496 U.S. 372, Petition at 20a, 21a. Emphasis added to insert omitted sentence.

Idaho's Rules, civil and appellate, provide neutral procedures, not preemptive of federal law. The applicable Idaho Rules require the Petitioners to obtain a certificate of finality to appeal the denial of qualified immunity defense. The Petitioners insistence on their approach to procedure, not the applicable Rules of the Idaho Supreme Court, may be declined.

3. The Idaho Supreme Court's Order does not conflict with *Mitchell.*

Mitchell v. Forsyth, supra (and *Behrens v. Pelletier,* ___ U.S. ___, 116 S.Ct. 834 (1996)) address the application of the federal statute governing appeals, 29 U.S.C. § 1291, and the federal collateral order doctrine to rulings on qualified immunity under Section 1983. Nothing in either decision holds, or even suggests, that states must construe their own statutes and rules governing appeals to conform to the federal rule. Nor is there anything in Section 1983 or in either decision that suggests that Congress intended to compel state courts to follow federal procedures when Section 1983 claims are brought in state court. Consequently, there is no conflict between the state's ruling and this Court's decisions that would justify review by this Court.

4. The Idaho Supreme Court recognizes the role of qualified immunity and, where properly presented, will apply it.

In Idaho, an interlocutory appeal is available to review the question presented by the denial of the state actors' request for dismissal/summary judgment upon the trial court's issuance on a certificate pursuant to I.R.C.P. 54(b). No decision of the Idaho Supreme Court holds otherwise; the application and importance of the defense of qualified immunity is completely recognized in Idaho law. See *Arnzen v. Richardson,* 854 P.2d 242, at 246-248, 123 ID 899, at 904-906 (1993); *Farnworth v. Femling,* 869 P.2d 1387, 125 ID 283 (1994) and *Lubcke v. Boise City/Ada County Housing Authority,* 860 P.2d 653, 124 ID 450 (1993). Unless and until the Idaho Supreme Court holds otherwise, denials of the defense of qualified immunity are immediately appealable in accordance with applicable, neutral rules.

CONCLUSION

No holding of this Court requires states to hear an interlocutory appeal in derogation of their rules. The Petition should be denied.

Respectfully submitted
on behalf
of Respondent
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APPENDIX A

Idaho Rule of Civil Procedure 54(b) Judgment upon multiple claims or involving multiple parties.

(1) Certificate of Final Judgment. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment upon one or more but less than all of the claims or parties only upon an express determination that there is no just reason for delay and upon express direction for the entry of the judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the actions as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. If any parties to an action are entitled to judgment against each other such as on a claim and counterclaim, or upon cross-claims, such judgments shall be offset against each other and a single judgment for the difference between the entitlements shall be entered in favor of the party entitled to the larger judgment. In the event the trial court determines that a judgment should be certified as final under this Rule 54(b), the court shall execute a certificate which shall immediately follow the court's signature on the judgment and be substantially the following form:

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED this _____ day of _____, 19___.

_____

(Signature – District Judge)

APPENDIX B

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

KRISTINE L. FANKELL, PLAINTIFF, VS. MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON H. DEAN SUMMERS, each of them individually, and the IDAHO STATE LIQUOR DISPENSARY DEFENDANTS	CASE NUMBER: CV95-00529 ORDER

Pursuant to Defendant's Motion to Dismiss previously filed herein, this matter came on for hearing on the 13th day of February, 1996, wherein the Plaintiff appearing by and through her Attorney of Record, James A. Raeon, and the Defendant appearing by and through its

Attorney of Record, Nicole McKay, Deputy Attorney General, and after a review of the record and files herein, the Motions and Briefs submitted in support thereof;

NOW, THEREFORE,

IT IS FURTHER HEREBY ORDERED that the Defendant's Motion to Dismiss, which was considered by this Court as a Motion for Summary Judgment, is hereby denied.

IT IS FURTHER HEREBY ORDERED that the Idaho State Liquor Dispensary is dismissed as a party Defendant in the above entitled action.

DONE AND ENTERED this 22 day of February, 1996.

/s/ J.R. MICHAUD
JAMES R. MICHAUD
DISTRICT JUDGE